Catholic University Law Review

Volume 52
Issue 4 *Summer 2003*

Article 9

2003

Balancing the First Amendment and National Security: Can Immigration Hearings Be Closed to Protect the Nation's Interest?

Meghan E. Ferrell

COMMENTS

BALANCING THE FIRST AMENDMENT AND NATIONAL SECURITY: CAN IMMIGRATION HEARINGS BE CLOSED TO PROTECT THE NATION'S INTEREST?

Meaghan E. Ferrell[*]

The First Amendment restricts Congress from making laws that abridge freedom of speech and freedom of the press.[1] The Supreme Court has held that free speech is not absolute; instead, it must be balanced against valid governmental interests.[2] In the aftermath of the

---

[*] May 2003 graduate of The Catholic University of America, Columbus School of Law.

1. *See* U.S. CONST. amend. I. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* Implicit in the restriction on abridging freedom of speech or of the press is that the freedom already existed. *See id.* That freedom may not previously have existed in the immigration system. If that is true, there is no freedom to curtail and no First Amendment right to access information and/or proceedings that are the product of the Bureau of Citizenship and Immigration Service's (formerly the Immigration and Naturalization Service's) functions.

2. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1, 9-10 (1979) (stating that the First Amendment does not prohibit a state from regulating professional organizations in the interest of the public); Konigsberg v. State Bar of California, 366 U.S. 36, 49-51 (1961) (holding that a state bar applicant's failure to respond to questions regarding his involvement in the Communist Party was not protected by the First Amendment); In re Anastaplo, 366 U.S. 82, 89 (1961) (finding that the state's interest in regulating bar admission outweighs petitioner's First or Fourteenth Amendment right to freedom of speech).

In *Konigsberg*, the Supreme Court debated over whether the First Amendment is an absolute right or if, in certain circumstances, it is subject to a balancing test. *See Konigsberg*, 366 U.S. at 50-51. Justice Black's dissenting opinion stated that the language of the First Amendment that prohibits Congress from abridging the freedom of speech indicates that "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Id.* at 61 (Black, J., dissenting). Justice Black expressed a fear that the Bill of Rights could be "balance[d] . . . out of existence," when its purpose was to keep those rights out of congressional grasp. *Id.* The majority of the Court, on the other hand, relied on Court precedent in its holding:

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental

September 11, 2001 attacks, the public seems to agree.[3] In fact, a New York Times poll conducted just before the first anniversary of the attacks revealed that forty-nine percent of Americans felt that the First Amendment's protections went too far in the context of the war on terrorism.[4] Since the tragic events of September 11, 2001, Americans have been doing what Americans do best in times of national threat: rallying behind their country and government.[5]

The federal judiciary historically has deferred to the political branches in foreign affairs and matters of national security.[6] However, judicial deference has been limited in recent cases stemming from the terrorist

---

interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

Id. at 50. The Court cited Justice Holmes in *Abrams v. United States* to support this point. *Id.* at 50 n.11 (quoting 250 U.S. 616, 627 (1919)) ("I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."). The Court compared this to Justice Brandeis' opinion in *Whitney v. California*. *Id.* (quoting 274 U.S. 357, 373 (1927)) ("But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute."). Finally, the Court quoted Chief Justice Hughes to support its opinion. *Id.* (quoting Near v. Minnesota, 283 U.S. 697, 716 (1931)) ("[T]he protection [of free speech] even as to previous restraint is not absolutely unlimited.").

3. A Los Angeles Times poll, conducted from August 22–25, 2002, revealed that forty-nine percent of those polled were willing to give up some of their civil liberties in order to make the country safe from terrorism. L.A. TIMES Poll, *available at* http://www.pollingreport.com/terror3.htm (last visited Sept. 2, 2003); *see also* Nicholas D. Kristof, Editorial, *Security and Freedom*, N.Y. TIMES, Sept. 10, 2002, at A25.

4. *See* Kristof, *supra*, note 3. By the second anniversary of the September 11, 2001 attacks, the number of citizens who believed the First Amendment goes too far dropped to thirty-four percent. First Amendment Center, STATE OF THE FIRST AMENDMENT 2003 2, *available at* www.fac.org/PDF/SOFA.2003.pdf.

5. Immediately after the September 11, 2001 attacks, President Bush's ratings soared. *See* Jane Spencer, *Newsweek Poll: Bush Soars*, NEWSWEEK, Sept. 15, 2001, *at* http://msnbc.com/news/629455.asp (last visited Mar. 1, 2003). The *Newsweek* poll found that eighty-nine percent of respondents approved of the way President Bush responded to the crisis. *Id.* His overall approval rating rose to eighty-two percent, surpassing President George H. W. Bush's rating during the Gulf War, and nearly equaling that of President Franklin D. Roosevelt after the attack of Pearl Harbor in 1941. *Id.* President Bush's approval rating had been as low as fifty-two percent in July 2001, according to a *USA Today* poll. *See* Richard Benedetto, *Bush Approval Rating Down 10 Points Since April*, USA TODAY, Jul. 2, 2001, *available at* http://www.usatoday.com/news/washington/july01/2001-07-02-bush.htm.

6. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (stating that "[i]n this vast external realm [of foreign affairs], with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation"); *see also* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1400-01 (1999) (tracing the political question doctrine through history).

attacks, in which courts have considered challenges to the authority of the Attorney General and the Immigration and Naturalization Service (INS)[7] to regulate deportation hearings as part of the war on terror.[8] Two such cases involve claims by press organizations that a directive denying them access to deportation hearings violates their First Amendment rights.[9] The two cases, *Detroit Free Press v. Ashcroft* and *North Jersey Media Group, Inc. v. Ashcroft*, traveled from the district courts, where the government lost, to the Courts of Appeals for the Third and Sixth Circuits, which split on the issue.[10] The Third Circuit afforded great deference to the decisions of the executive branch,[11] whereas the two district courts and the Sixth Circuit offered virtually none.[12] With two circuits split and a vital issue of national security in the balance, the Supreme Court denied the *North Jersey Media* petitioners

---

7. The Immigration and Naturalization Service was renamed the Bureau of Citizenship and Immigration Service as of November 25, 2002. Establishment of Bureau of Citizenship and Immigration Services, 6 U.S.C. § 271 (2003).

8. *See, e.g.*, Ctr. for Nat. Sec. Studies v. U.S. Dept. of Justice, 215 F. Supp. 2d 94, 113 (D.D.C. 2002) (requiring the government to release the identities of those individuals detained during the post-September 11th investigations and their counsel, but allowing the government to withhold the dates and locations of arrest, detention, and release); Haddad v. Ashcroft, 221 F. Supp. 2d 799, 805 (E.D. Mich. 2002) (holding that Haddad's classification as a "special interest" alien tainted his ability to receive a fair deportation hearing); North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (reversing a preliminary injunction that enjoined the government from closing deportation hearings of "special interest" aliens); Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 940 (E.D. Mich. 2002), *aff'd* 303 F.3d 681 (6th Cir. 2002) (granting a motion to enjoin the government from closing deportation hearings of "special interest" aliens).

9. *See North Jersey Media Group*, 205 F. Supp. 2d 288; *Detroit Free Press*, 195 F. Supp. 2d 937.

10. *See Detroit Free Press*, 303 F.3d 681; *North Jersey Media Group, Inc.*, 308 F.3d 198. At the time of the *Detroit Free Press* appeal to the Sixth Circuit Court of Appeals, the bench was half empty, having only eight of the sixteen positions filled. *See* Press Release, United States Senate Republican Policy Committee, New Appellate Judges Needed Now (Apr. 25, 2002), *available at* http://www.senate.gov/~rpc/releases/1999/jd042502.htm.

11. *See North Jersey Media Group*, 308 F.3d at 220 ("Our judgment is confined to the extremely narrow class of deportation cases that are determined by the Attorney General to present significant national security concerns. In recognition [of] his experience (and our lack of experience) in this field, we will defer to his judgment.").

12. *Detroit Free Press*, 195 F. Supp. 2d at 945 ("To determine the limitations of the right of access and thus where the First Amendment will not prohibit a particular governmental action, courts traditionally apply a strict scrutiny analysis."); *North Jersey Media Group*, 205 F. Supp. 2d at 304 ("There is no basis for finding that the harm caused to the government would outweigh the value achieved by enjoining a practice that violates the Constitution."); *Detroit Free Press*, 303 F.3d at 685 ("We hold that the Constitution meaningfully limits non-substantive immigration laws and does not require special deference to the Government.").

certiorari on May 27, 2003.[13] This left immigration hearings of aliens with suspected terrorist ties closed in all but the Sixth Circuit.[14]

This Note examines the executive branch's authority to regulate the conduct of immigration proceedings in the interest of national security. This Note first reviews two relevant court cases from the Third and Sixth Circuit Courts of Appeals. It then outlines the historical holdings regarding the legislative branch's plenary power in matters of immigration. This Note then analyzes the level of deference the courts have granted, and should continue to grant, to the executive branch when reviewing actions taken by the executive in immigration matters purporting to be in the national public interest. Finally, this Note discusses the reasons why access to immigration hearings should not be compared to access to criminal proceedings.

I. THE GOVERNMENT RESPONDS TO THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001 BY TIGHTENING IMMIGRATION POLICIES

A. The Horrific Events of September 11, 2001

On the morning of September 11, 2001, nineteen hijackers commandeered four airplanes and crashed them into the World Trade Center and the Pentagon in the most deadly terrorist attack on United States soil.[15] Shortly following the attacks, authorities learned that at least fifteen of the hijackers, all of Middle Eastern descent and members of the militant group al Qaeda, had entered the United States legally on various types of visas.[16] In response to the attacks, Congress approved a Joint Resolution on September 18, 2001 that authorized the President "to take action to deter and prevent acts of international terrorism against the United States."[17]

---

13. North Jersey Media Group, Inc. v. Ashcroft, 123 S. Ct. 2215 (2003).

14. *See* discussion *infra* Part I.C.; *see also* Travis Loop, *Stepping Up Secrecy*, PRESSTIME, Sept. 2003, at 34.

15. *See* Evan Thomas & Mark Rosenball, *Bush: "We're at War,"* NEWSWEEK, Sept. 24, 2001, at 34. More people were killed by the suicide hijackers of September 11, 2001 than were killed at Pearl Harbor. *Id.* A fourth plane was hijacked and crashed into a field in rural Pennsylvania. *Id.*

16. *See* Edward T. Pound, *The Easy Path to the United States for Three of the 9/11 Hijackers*, U.S. NEWS & WORLD REP., Dec. 12, 2001, *available at* http://www.usnews.com/usnews/news/terror/articles/visa011212.htm.

17. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The purpose of the resolution was to "prevent any future acts of international terrorism against the United States." *Id.* § 2. In order to accomplish this goal, the Senate authorized the President to use "all necessary and appropriate force" against all organizations, countries, and persons who participated in any way in the September 11, 2001 terrorist attacks. *Id.* In addition, the resolution constituted "specific statutory authorization" as defined in section 5(b) of the War Powers Resolution. *Id.*

B. The INS Searched the Immigrant Population for Suspected Terrorists

1. Detention of Aliens for Violations of Immigration Policy

As part of the administration's policy, the INS began "identify[ing], question[ing], and institut[ing] removal proceedings"[18] against aliens with suspected terrorist ties, and authorized holding the aliens for extended periods of time.[19] A post-September 11th regulation established by the Department of Justice (DOJ) permits the INS to hold arrestees for up to forty-eight hours before determining how to proceed.[20] The procedural options include voluntary departure from the United States, arrest and detainment, and release of the alien on bond or his/her own recognizance.[21] The new regulation extended the preliminary holding period by twenty-four hours, which enabled the INS to "establish an alien's true identity; to check domestic, foreign, or international databases and records systems for relevant information regarding the alien; and to liaise with appropriate law enforcement agencies in the United States and abroad."[22] The DOJ regulation also provided an exception to the general forty-eight hour rule that allowed continued detention should "an emergency or other extraordinary circumstance"

---

18. *See* Detroit Free Press v. Aschroft, 195 F. Supp. 2d 937, 939-40 (E.D. Mich. 2002), *aff'd* 303 F.3d 681 (6th Cir. 2002).

19. *See* Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 98 (D.D.C. 2002) (stating that as of May, 31, 2002, a total of 751 individuals had been detained on immigration violations over the course of the hijacking investigation, of which seventy-four were still detained as of June 13, 2002). The government's actions are consistent with those exercised in previous times of war. *See* Kim Barker, *Federal Tactics Criticized in Roundup of 1,100; FBI Defends Detention Policy, but Some Courts Aren't Convinced*, CHI. TRIB., Sept. 11, 2002, at 16. For instance, after World War I, the government questioned, detained, or deported thousands of legal immigrants in an attempt to thwart the spread of communism. *Id.* During World War II, individuals of Japanese ancestry in the United States were gathered and placed in internment camps. *Id.* During the Cold War, the government jailed and blacklisted people for their alleged communist views. *Id.*

20. Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R. § 287.3(d) (2002). The regulation was issued in the Federal Register on September 20, 2001, with an effective date of September 17, 2001. *See* Custody Procedures, 66 Fed. Reg. 48,334 (Sept. 20, 2001) (to be codified at 8 C.F.R. pt. 287). On May 28, 2002, another INS regulation was published in the Federal Register. *See* Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36,799 (May 28, 2002) (to be codified at 8 C.F.R. pt. 3). This regulation permitted immigration judges to issue protective orders and to seal any records related to sensitive law enforcement material or national security information. *See id.*

21. 8 C.F.R. § 287.3(d).

22. Custody Procedures, 66 Fed. Reg. at 48,334.

arise.[23] As of June 13, 2002, seventy-four detainees out of those originally held after September 11th remained in INS custody.[24]

2. Classification of Aliens as "Special Interest" Cases Pursuant to the "Creppy Memo"

On September 21, 2001, at the direction of Attorney General John Ashcroft, Chief Immigration Judge Michael Creppy issued a memorandum (Creppy Memo)[25] to all immigration judges and court administrators requiring that certain "special interest cases"[26] be held in closed proceedings and with strict confidentiality.[27] The memo stated

---

23. *Id.* It is claimed that the INS detained many of the aliens for immigration regulation violations, some of which would not normally justify detainment. *See* Amnesty International, AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA 2 (Mar. 2002), *available at* http://www.amnestyusa.org/usacrisis/9.11.detentions2.pdf (last visited Sept. 3, 2003).

24. *See Ctr. for Nat. Sec. Studies*, 215 F. Supp. 2d at 98.

25. Memorandum from Michael Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001), *available at* http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf (last visited Nov. 23, 2003). The Creppy Memo was distributed to all immigration judges and court administrators, and stated the following:

> As some of you already know, the Attorney General has implemented additional security procedures for certain cases in the Immigration Court. Those procedures require us to hold the hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court . . . . Although this is obviously a time of heightened security and concern, I am confident that each of us will remember our obligation to be fair and impartial in our dealings with everyone who comes to our courts. Thank you for your understanding and your cooperation.

Id. Rahib Haddad, an INS detainee, challenged the policy in the District Court for the Eastern District of Michigan. *See* Haddad v. Ashcroft, 221 F. Supp. 2d 799, 802 (E.D. Mich. 2002). Haddad alleged that the Creppy Memo violated the Administrative Procedure Act's notice-and-comment requirements. *See id.* The court ruled that although the Creppy Memo appeared to be a final agency rule, it fell within the "foreign policy exception" of the Administrative Procedures Act, 5 U.S.C. § 553(a)(1), and therefore was exempt from the notice-and-comment requirement. *Id.* at 802 n.7.

26. "Special interest" aliens are identified by the DOJ based on evidence acquired during post-September 11th investigations. Government's Application For a Stay Pending Appeal, at 5, Ashcroft v. North Jersey Media Group, Inc., 536 U.S. 954 (2002). They consist of individuals who have "connections with, or possess information pertaining to, terrorist activities in the United States." North Jersey Media Group v. Ashcroft, 308 F.3d 198, 202 (3d Cir. 2002) (quoting Dale L. Watson, FBI Executive Assistant Director for Counterterrorism and Counterintelligence). In addition, aliens with close ties to the hijackers or who have known relations with al Qaeda or other terrorist groups will be deemed "special interest" cases. *Id.*

27. *See* Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 941 (E.D. Mich. 2002). Specifically, procedures proscribed by Judge Creppy appeared as follows:

that Attorney General Ashcroft had established additional security procedures applicable when such cases came before the court.[28] The procedures included the requirement that only judges with security clearances hear special interest cases, that INS employees not comment on a special interest alien's appearance before the court,[29] and, most significantly, that all proceedings be closed to visitors, family, and press.[30]

An affidavit by James S. Reynolds, Chief of the Terrorism and Violent Crimes Section of the DOJ's Criminal Division, sought to explain the purpose of the Creppy Memo in terms of protection of the aliens.[31] The affidavit asserted that in closing the deportation hearings, the government sought to protect the special interest case detainees from the intimidation or harm that public identification would bring, and from

---

1. Because some of these cases may ultimately involve classified evidence, the cases are to be assigned only to judges who currently hold at least a secret clearance.
2. You should make certain that INS (or whoever provides your courtroom security) is informed of the hearing and the need to provide additional courtroom security.
3. Each of these cases is to be heard separately from all other cases on the docket. The courtroom must be closed for these cases—no visitors, no family, and no press.
4. The Record of Proceeding is not to be released to anyone except an attorney or representative who has an EOIR-28 on file for the case (assuming the file does not contain classified information). Any other request for information on one of these cases must be submitted in writing and processed as a FOIA request, i.e., forwarded to the Office of the General Counsel.
5. This restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing. Any press requests must be referred to the Public Affairs Office at (703)-305-0289.
6. The ANSIR record for the case is to be coded to ensure that information about the case is not provided on the 1-800 number and the case is not listed on the court calendars posted outside the courtrooms.
7. Specific instructions about ANSIR coding and marking the ROP are provided below.
8. Finally, you should instruct all courtroom personnel, including both court employees and contract interpreters, that they are not to discuss the case with anyone.

Memorandum from Michael Creppy, *supra* note 25.

28. *See* Memorandum from Michael Creppy, *supra* note 25.

29. An example of the "deny or confirm" requirement is included in a research article written by Amnesty International (AI). *See* Amnesty International, *supra* note 23, at 7. Amnesty International reports that one immigration lawyer who repeatedly called an INS 1-800 number, which normally allowed the lawyer to enter his client's identification number to receive information on the client's whereabouts, received a new message. *Id.* For post-September 11th detainees, the message he received was "case not found." *Id.* When the lawyer spoke to INS officials, they stated that his client was "not in the system" even though the lawyer knew that his client was in detention. *See id.*

30. Memorandum from Michael Creppy, *supra* note 25.

31. *Detroit Free Press*, 195 F. Supp. 2d at 946-47.

adverse treatment even if they were absolved from any connection to terrorism.[32] In addition, according to Reynolds, the government would encourage the detainees to continue communicating with terrorist organizations so the government might acquire information to aid in the infiltration of these groups.[33] The affidavit further stated that releasing the names of the detainees could reveal the direction and progress of the investigation and allow terrorist organizations to "interfere with the pending proceedings by creating false or misleading evidence."[34]

Despite the intentions of the government in issuing the directive, press organizations in Michigan and New Jersey challenged the Creppy Memo.[35] In both lawsuits, the press organizations sought to enjoin the secrecy order.[36] Each asserted a First Amendment right to attend these "special interest" immigration proceedings.[37]

C. The Press Challenge to the INS's New Closed Deportation Hearing Policy

1. Detroit Free Press v. Ashcroft

The first challenge to closed deportation hearings, *Detroit Free Press v. Ashcroft*, was heard in April 2002 in the Federal District Court for the Eastern District of Michigan.[38] In *Detroit Free Press*, a conglomerate of newspapers and Congressman John Conyers, Jr., challenged their exclusion from the hearings of an immigrant identified as a special interest case by the DOJ.[39] The immigrant in the proceeding, Rabih Haddad, entered the United States with his family in 1998 on a six-month tourist visa and improperly remained in the country after his visa expired.[40] The government arrested and detained Haddad on December

32. *Id.* ("[D]isclosing the names of 'special interest' detainees . . . could lead to public identification of individuals associated with them, other investigative sources, and potential witnesses . . . [and t]errorist organizations . . . could subject them to intimidation or harm . . . .").

33. *Id.* at 946 (stating that "'divulging the detainees' identities may deter them from cooperating . . . [and] terrorist organizations with whom they have connection may refuse to deal further with them . . . thereby eliminating valuable sources of information for the Government and impairing its ability to infiltrate terrorist organizations").

34. *Id.* at 946-47.

35. *See Detroit Free Press*, 195 F. Supp. 2d at 937-42; North Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288 (D.N.J. 2002), *rev'd* 308 F.3d 198 (3d Cir. 2002).

36. *Detroit Free Press*, 195 F. Supp. 2d at 941; *North Jersey Media Group*, 205 F. Supp. 2d at 290.

37. *Detroit Free Press*, 195 F. Supp. 2d at 941-42; *North Jersey Media Group*, 205 F. Supp. 2d at 290.

38. 195 F. Supp. 2d 937 (E.D. Mich. 2002), *aff'd* 303 F.3d 681 (6th Cir. 2002).

39. *Id.* at 940-41.

40. *See id.* at 941.

14, 2001; a bond hearing was held five days later.[41] The government suspected that Haddad was funneling funds from an Islamic charity, which he operated, to terrorist organizations.[42] At Haddad's bond hearing, the court instructed members of the public, including Haddad's family, Congressman Conyers, and the press, that the hearing was closed to the public.[43] The court had not provided prior notice that the proceedings would be closed.[44] Haddad objected to the closure, but the immigration judge informed him that the judge's supervisors had ordered her to close the hearing, and that she was unable to reverse the supervisors' decision.[45] As a result of evidence provided at the hearing, the immigration judge denied Haddad bail and ordered his detainment.[46]

In granting the plaintiffs' preliminary injunction, and determining that the newspapers had a right to access the deportation hearings, the district court looked to the historical tradition concerning the accessibility of

---

41. *Id.*

42. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 684 (6th Cir. 2002).

43. *Id.*

44. *Id.*

45. *Detroit Free Press*, 195 F. Supp. 2d at 941; *see also* Declaration of Ashraf Nubani, attorney for Rahib Haddad, *available at* http://archive.aclu.org/court/haddad_nubani.pdf (last visited Mar. 3, 2003) (setting forth the steps leading up to the lawsuit at issue).

46. *Detroit Free Press*, 195 F. Supp. 2d at 941. Additional hearings regarding Haddad's status were conducted on January 2 and 10, 2002. *Id.* Both of these hearings, which had adverse results for Haddad, were heard before the same immigration judge and were also closed to the public. Declaration of Ashraf Nubani, *supra* note 45.

At the same time that the newspaper plaintiffs filed their lawsuit, Haddad also filed a lawsuit against the DOJ, claiming violation of his due process rights. *See* Haddad v. Ashcroft, 221 F. Supp. 2d 799, 801 (E.D. Mich. 2002). After the Sixth Circuit affirmed the District Court's finding in *Detroit Free Press*, the trial court found that Haddad's closed proceedings and classification as a special interest case resulted in biased determinations by the immigration judge. *See id.* at 803-04. Therefore, the court ordered that Haddad either be released from detention or be granted a new detention hearing held before a new judge and open to the press and public. *See id.* at 805.

Haddad's case was assigned to a new immigration judge, who began a bond redetermination hearing on October 1, 2002. *See* Detroit Free Press v. Ashcroft, No. 02-70339, 02-70605, 2002 WL 31317398, at *1 (E.D. Mich. Oct. 7, 2002). After an *in camera* review of the government's documents, the judge made particularized findings and closed a portion of the hearing in accordance with 8 C.F.R. § 3.46(a), which permits closure "to protect national security or law enforcement interests." *Id.* Because the newspaper plaintiffs were not present at the *in camera* review, nor were they allowed to make an objection to the closure of the redetermination hearing, they filed emergency motions to require the immigration judge to "(1) allow the [n]ewspaper [p]laintiffs' counsel to be heard; (2) make a particularized determination, on the record, that closure is necessary to further a compelling interest; (3) release transcripts of the closed proceedings; and (4) release a non-redacted copy of the Government's pre-hearing brief." *Id.* The court concluded that the immigration judge had properly closed the hearing, but that in the future, the court must make particularized findings on the record as to the basis for closure. *See id.*

removal hearings and the substantive importance of openness in the hearings.[47] The court recognized Congress' plenary power to legislate rules for immigration, but stated that those powers extended only to the substantive decisions of immigration, not to the procedural decisions that allow the system to function.[48] In other words, Congress can decide who may and may not enter the country, but it cannot interfere with procedural due process rights.[49] The court held that the government's interest in closing the hearings was not compelling and that the press would suffer irreparable injury if denied access to the hearings.[50]

On appeal, the Sixth Circuit Court of Appeals upheld the injunction in favor of the plaintiffs.[51] The court affirmed that the political branch's plenary power over matters of immigration is confined to substantive determinations and does not extend to judicial procedures that ultimately affect constitutional rights.[52] The court derived its analysis from a line of Supreme Court cases holding that non-citizens residing in the United States "are afforded 'the same constitutional protections of due process that we accord citizens.'"[53] Because Haddad had lived in the United

47. *Detroit Free Press*, 195 F. Supp. 2d at 943-44. The court noted the differences Congress has announced in the accessibility of exclusion and deportation hearings. *Id.* at 943. While Congress has specifically mandated the closing of exclusion hearings, it has remained silent on the opening or closing of deportation. *See id.* The court inferred from Congress' inaction that the hearings are - and have always been - presumptively open. *Id.*

48. *Id.* at 946 ("[T]he plenary power doctrine applies to '[p]olicies pertaining to the entry of aliens and their right to remain here' but '[i]n the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process.'" (quoting Galvan v. Press, 347 U.S. 522, 531 (1954)).

49. *See id.*

50. *Id.* at 947 ("'[E]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.'" (quoting Newson v. Norris, 888 F.2d 371, 378 (6th Cir. 1989)).

51. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

52. *See id.* at 686-93 ("It would be ironic, indeed, to allow the Government's assertion of plenary power to transform the First Amendment from the great instrument of open democracy to a safe harbor from public scrutiny.").

53. *Id.* at 688 (quoting Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 309 (1970)); *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (stating that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders"); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (holding that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"); Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950) (acknowledging that "[t]he constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body"); Wong Wing v. United States, 163 U.S. 228, 237 (1896) (stating that a congressional act, which called for the punishment and hard labor of Chinese immigrants, was valid only if it provided for a judicial trial to establish guilt). *But see* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 546-47 (1950) (holding that courts do not have the authority to

States for a number of years, albeit illegally, the court found that he was entitled to constitutional protections.[54]

The court then turned its focus to the First Amendment claims and determined that the plaintiffs' First Amendment rights were violated when the plaintiffs were barred from the proceedings.[55] The court relied largely upon the applicability of the tests set forth by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*[56] and *Press-Enterprise Co. v. Superior Court of California*.[57] In both of these cases, the Supreme Court stated that the First Amendment provided access to criminal proceedings.[58] In deciding on the openness of a judicial proceeding, the Supreme Court stated that a court should consider whether the type of proceeding is one that has been historically open to the public and if the public would play a positive role in the administration of justice.[59] The Sixth Circuit answered these questions affirmatively and held that closing the deportation hearings violated the plaintiffs' First Amendment rights.[60]

In considering whether the government could overcome the plaintiffs' First Amendment right of access to the deportation hearing, the court further applied the strict scrutiny analysis articulated in *Globe Newspaper Co. v. Superior Court*.[61] This test is applicable when government actions, aimed at protecting sensitive information, inadvertently impede on First Amendment guarantees.[62] In determining

---

review determinations of exclusion by the Government); Landon v. Plasencia, 459 U.S. 21, 37 (1982) (holding that due process should have been afforded to a permanent non-citizen when the INS attempted to exclude him at the border upon return from a trip abroad).

54. *See Detroit Free Press*, 303 F.3d at 687-84.

55. *Id.* at 694-705.

56. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

57. Press-Enter. Co. v. Super. Ct. of Cal., 478 U.S. 1 (1986).

58. *Press-Enter. Co.*, 478 U.S. at 10-13; *See Richmond Newspapers*, 448 U.S. at 580; *see also* discussion *infra* Part II.C.1.

59. *See Press-Enter. Co.*, 478 U.S. at 7-8; *Richmond Newspapers*, 448 U.S. at 569-71; discussion *infra* Part II.C.1.

60. *See Detroit Free Press*, 303 F.3d at 700. In determining that there is a history of openness, the appellate court relied on Congress' failure to close the deportation hearings and on the creation of a presumption of open hearings by INS regulations. *Id.* at 701. The court listed the reasons why public access plays a positive role in deportation hearings. *Id.* at 703-05. First, public access ensures fairness by placing a check on the Executive branch. *Id.* at 703-04. Second, it ensures that the government does not make any mistakes. *Id.* at 704. Third, it serves a "therapeutic" value to those who feel targeted by the investigations, allowing them to see first hand that the government is not acting unfairly. *Id.* Fourth, the perception of integrity and fairness is enhanced. *Id.* Fifth, it allows active public participation in the government. *Id.* at 704-05.

61. *Id.* at 705 (citing Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 610-11 (1982)).

62. *See id.*; *see also Globe Newspaper*, 457 U.S. at 606-07. The issue before the Supreme Court in *Globe Newspaper* was the validity of a Massachusetts statute that

whether access to a hearing should be denied, the *Globe Newspaper* test requires that the government provide evidence of a compelling interest in protecting particularized findings that sufficiently justifies overriding the presumption of openness in *Richmond Newspapers*.[63] In order for the government to succeed under *Globe Newspaper*, the compelling interest must be narrowly tailored so as not to act as a "mandatory closure rule."[64] The Sixth Circuit panel decided that although the government presented a compelling public interest, it did not survive the *Globe Newspaper* test.[65] Specifically, the Creppy Memo did not restrict the alien's speech with regard to the events that took place during the proceedings,[66] nor did it require an individual assessment of whether a

---

required trial judges to close hearings during the testimony of rape victims who were under the age of eighteen. *Id.* at 598. The petitioner, Globe Newspaper, was denied access to a criminal trial in which a man was being tried for forcible rape and forced unnatural rape of three minor girls. *Id.* Globe Newspaper claimed that the statute violated its First Amendment freedom of the press. *See id.*

In applying the *Richmond Newspaper* test, the Supreme Court considered whether "the denial is necessitated by a compelling, governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606-07. The Court agreed that the interest of the government was compelling, but determined that it did not rise to the level necessary to justify mandatory closure. *Id.* at 607-08. Instead, the trial court should determine on a case-by-case basis whether the victim in the case before the court would best be served by a closed proceeding. *Id.* at 608. Because the statute's narrow tailoring was insufficient, the Supreme Court found it a violation of the First Amendment. *Id.* at 609, 610-11.

63. *Id.* at 606-07; *see Detroit Free Press*, 303 F.3d at 705. "Under the standard articulated in *Globe Newspaper*, government action that curtails a First Amendment right of access 'in order to inhibit the disclosure of sensitive information' must be supported by a showing 'that denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'" *Globe Newspaper*, 457 U.S. at 606-07.

64. *Globe Newspaper*, 457 U.S. at 607-09.

65. *Detroit Free Press*, 303 F.3d at 705 ("The Government's ongoing anti-terrorism investigation certainly implicates a compelling interest. However, the Creppy directive is neither narrowly tailored, nor does it require particularized findings. Therefore, it impermissibly infringes on the [n]ewspaper [p]laintiffs' First Amendment right of access.").

66. *See* Government's Application For a Stay Pending Appeal, *supra* note 26, at 6-7. There is nothing in the Creppy Memo that prevents the "special interest" alien from attending hearings, receiving copies of unclassified information, or from presenting witness testimony. The government contends that disclosure by a special interest alien of the contents of a hearing is less damaging than "direct access by the public . . . to the hearing itself." *Id.* at 30. The alien may not wish to fully describe the discussions in the hearing for self-interested reasons, he may not remember all that occurred in the hearing, or "the importance of any particular detail may not be apparent to the alien or even to the government." *Id.* at 30-31.

In a footnote, the government analogizes the special interest alien to a witness in grand jury proceedings. *Id.* at 31 n.12. In both instances, the proceedings are closed to "avoid disclosing the investigation's progress to its potential targets and to spare suspects undue embarrassment." *Id.* However, each can reveal his own testimony after the fact. *Id.*

proceeding should be closed.[67] The court held that the government's interest was insufficient to justify closing the deportation hearings because the Creppy Memo was not narrowly tailored, as required by strict scrutiny analysis.[68] Accordingly, the policy infringed plaintiffs' First Amendment rights and the injunction was granted.

2. North Jersey Media Group, Inc. v. Ashcroft

In the District Court of New Jersey, a similar challenge was brought in *North Jersey Media Group, Inc. v. Ashcroft*.[69] In *North Jersey Media Group*, the plaintiffs claimed that the DOJ violated their First Amendment right to attend all deportation hearings, as opposed to the plaintiffs in *Detroit Free Press*, who only sought relief for Haddad's proceedings.[70] As a result, an injunction granted in *North Jersey Media Group* would be of "nationwide scope, appl[ying] to all proceedings regardless of whether plaintiffs seek to attend."[71] The plaintiffs in *North Jersey Media Group* claimed a violation of their First Amendment rights because of their preclusion from attending numerous deportation hearings due to individual determinations that the aliens in the proceedings were of "special interest."[72]

---

67. *Detroit Free Press*, 303 F.3d at 707-10.

68. *Id.* at 710 ("The Creppy directive is underinclusive by permitting the disclosure of sensitive information while at the same time drastically restricting First Amendment rights. The directive is over-inclusive by categorically and completely closing all special interest hearings without demonstrating beyond speculation, that such a closure is absolutely necessary.").

69. 205 F. Supp. 2d 288 (D.N.J. 2002). The ACLU is a party to both *Detroit Free Press* and *North Jersey Media Group*. *See* Press Release, Americans Civil Liberties Union, *A Second Federal Court Rejects Government Secrecy, Orders Open Immigration Hearings in Post-Sept. 11 Challenge* (May 29, 2002), *available at* http://archive.aclu.org/news/2002/n052902c.html (last visited Sept. 3, 2003).

70. *See* North Jersey Media Group Inc. v. Ashcroft, 308 F.3d 198, 204 (3d Cir. 2002); *see also Detroit Free Press*, 303 F.3d at 683-84.

71. See *North Jersey Media Group*, 308 F.3d at 204.

72. *See* 205 F. Supp. 2d at 291. The plaintiffs gave three examples of reporters who were present at deportation hearings, and were asked to leave once the judge determined that the matter was a special interest case. *Id.* The first occurred on November 22, 2001 when a reporter was not allowed to attend a hearing on the basis of the Creppy Memo. *Id.* On February 12, 2002, another reporter was denied docket information with respect to an alien deemed a "special interest" case. *Id.* The same reporter also was denied access to the deportation hearing held the following day. *Id.* The reporters claim that at a deportation hearing on February 21, 2002, the immigration judge asked the INS attorney if the hearing involved a special interest matter, to which the INS attorney responded affirmatively. *Id.* The immigration judge then ordered all members of the press and public to leave the courtroom. *Id.*

One alien, whose deportation hearing was classified a "special interest" matter, filed a complaint in the District Court of New Jersey, claiming that the government violated his

The court used an analysis similar to that of the trial and appellate courts in *Detroit Free Press*.[73] It determined that Congress' plenary power over the immigration system is limited to substantive issues only; because the Creppy Memo involves procedural matters, its validity and application are subject to constitutional limitations.[74] The court then proceeded with a *Richmond Newspapers* analysis and determined, as did the courts in *Detroit Free Press*, that the history and value of open deportation hearings required the court to rule in favor of the plaintiffs.[75] The court granted the injunction.[76]

The government appealed to the Third Circuit Court of Appeals and requested a stay of the district court's decision.[77] When the stay was

---

due process rights under the Fifth Amendment, as well as provisions in an INS regulation and the Administrative Procedure Act. *North Jersey Media Group*, 205 F. Supp. 2d at 291 n.1 (referring to Zeidan v. Ashcroft, No. 02-843 (D.N.J. filed Feb. 28, 2002)). The government removed the "special interest" label from the alien's record and moved to dismiss the case as moot. *Id.* Subsequently, the case was dismissed without prejudice. *Id.*

73. *See generally North Jersey Media Group*, 205 F. Supp. 2d 288.

74. *Id.* at 296-97. The court stated that the Supreme Court has historically differentiated between substantive powers and procedural powers, finding that substantive powers are "subject to important constitutional limitations." *Id.* (citing Zadvydas v. Davis, 533 U.S. 678, 695 (2001)); *see also* INS v. Chada, 462 U.S. 919, 940 (1983) (holding that Congress' plenary power is limited by the Constitution).

75. *North Jersey Media Group*, 205 F. Supp. 2d at 300. The court held that due process rights have attached to deportation hearings since 1903 and, because open hearings are a safeguard of due process, deportation hearings have a substantial history of openness. *Id.* Further, the court stated that because deportation hearings possess many of the same characteristics of a criminal trial, the justifications for having open criminal proceedings apply equally to deportation hearings. *See id.* at 301. The similarities between the two proceedings include the fact that the alien appears before a judge, has charges filed against him, has the option of representation by counsel, has the opportunity to examine evidence against him, and has the opportunity to present evidence on his own behalf. *Id.*

76. *Id.* at 305. The test for granting a preliminary injunction is: (1) whether the plaintiff will suffer irreparable harm; (2) whether granting the injunction will result in greater harm to the nonmoving party; and (3) whether granting the injunction is in the public interest. *Id.* at 304-05. The court held that the first prong had been met because failure to enjoin the judicial powers granted by the Creppy Memo would result in irreparable harms to the plaintiffs' First Amendment right to access. *Id.* at 304. The second prong was met because if the injunction is granted, the government's position would not change. It could close the proceedings on a case-by-case basis pursuant to their own regulations. *Id.* Finally, the court stated that "[c]urtailing constitutionally protected speech will not advance the public interest, and 'neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.'" *Id.* at 305 (citing ACLU v. Reno, 217 F.3d 162, 180 (3d Cir. 2000)). The court concluded that the balance tipped in the plaintiffs' favor in determining that the public's right to access was more important than the government's interest in concealing names in the interest of national security. *See id.* at 305.

77. *See* North Jersey Media Group v. Ashcroft, 308 F.3d 198, 204 (3d Cir. 2002) ("On June 17, 2002, this Court granted expedited review of the [g]overnment's appeal but

refused, the government petitioned the Supreme Court to stay the decision pending appeal.[78] The Supreme Court granted the stay on June 28, 2002, but provided no guidance as to how it would decide the issue on certiorari.[79]

The government prevailed when the Third Circuit, in a two-to-one panel decision, held that the plaintiffs did not have a First Amendment right to access the hearings.[80] The Third Circuit agreed with the courts that had previously addressed the issue and declared that the *Richmond Newspapers* analysis was properly invoked.[81] Under that analysis, however, it determined that the history of openness was not sufficient to overcome the government's interest in closing the hearings.[82]

---

denied a stay."); *see also* Reporters Committee for Freedom of the Press, *Supreme Court Grants Stay, Allows Closed Immigration Proceedings* (July 1, 2002) *available at* http://www.rcfp.org/news/2002/0701northj.html (last visited Sept. 3, 2003).

78. *See North Jersey Media Group*, 308 F.3d at 204.

79. *See* Ashcroft v. North Jersey Media Group, Inc., 122 S. Ct. 2655 (2002).

80. *See North Jersey Media Group*, 308 F.3d at 202 ("[W]e find that the application of the *Richmond Newspapers* experience and logic tests does not compel us to declare the Creppy Directive unconstitutional. We will therefore reverse the Order of the District Court."); *see also* Jim Edwards, *Challenge To Secret Deport Hearings Appears Headed for U.S. High Court*, 169 N.J.L.J. 1188 (2002). Judge Greenberg, a Third Circuit Judge sitting on the panel presiding over *North Jersey Media Group*, recognized the severe implications of the panel's role: "We could make a decision here upholding this [trial ruling favoring openness] and lots of people may die .... You want us to run that risk? ... How can we do that? They say there's a whole mosaic." *Id.*

81. *See North Jersey Media Group*, 308 F.3d at 208. The court examined its prior decisions applying the *Richmond Newspapers* test to administrative hearings. *Id.* at 207-09; *see also* Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177 (3d Cir. 1999) (denying a claim that citizens have a First Amendment right to videotape a Township Planning Commission meeting); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1177 (3d Cir. 1986) (finding that *Richmond Newspapers* did not demand that state environmental agency records be open to the public); First Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467, 473-79 (3d Cir. 1986) (holding that the records from a judicial discipline hearing were not subject to public access because proceedings of that kind do not have a history of openness).

82. *See North Jersey Media Group*, 308 F.3d at 209-20. In its conclusion, the court stated that its analysis should not be construed to deny access to any administrative hearings or to all immigration hearings. *See id.* at 220. Instead, its analysis is to be applied only to "the extremely narrow class of deportation cases that are determined by the Attorney General to present significant national security concerns." *Id.* The Third Circuit's determination that the "special interest" cases are narrowly defined directly contravenes the trial court and the *Detroit Free Press* courts, all of which stated that the defined class was not narrowly tailored. *See, e.g.*, Detroit Free Press v. Ashcroft, 303 F.3d 681, 705 (6th Cir. 2002) ("The Government's ongoing anti-terrorism investigation certainly implicates a compelling interest. However, the Creppy directive is neither narrowly tailored, nor does it require particularized findings. Therefore, it impermissibly infringes on the [n]ewspaper [p]laintiffs' First Amendment right of access."); North Jersey Media Group v. Ashcroft, 205 F. Supp. 2d 288, 301-02 (D.N.J. 2002) ("The problem with the Creppy Memo is that there is nothing in it to prevent disclosure of this very information by

In vacating the injunction, the Third Circuit caused a split in the Circuits as to the validity of the press's First Amendment right to access versus the secrecy sought by the government in "special interest" immigration proceedings.[83] The inconsistency among the Circuits remains, however, because the Supreme Court denied the petitioners' writ of certiorari on May 27, 2003.[84]

II. PRECEDENT REQUIRES THAT JUDICIAL DEFERENCE ON ISSUES OF NATIONAL SECURITY BE APPLIED

A. The Legislative Branch Has Plenary Power Over Matters of Immigration, to Which the Judiciary Should Defer

The Supreme Court has long held that Congress's authority to make laws regarding immigration is so closely tied to both the conduct of foreign policy and the maintenance of national sovereignty, that the Court must recognize the plenary authority of the political branches.[85] The source of Congress's power to legislate in immigration matters is incident to the maintenance of national sovereignty.[86] Every government has an inherent responsibility to protect the national public interest.[87]

---

the 'special interest' detainee or that individual's lawyer, both of whom are permitted to be present in the 'special interest' proceedings.").

83. *See Detroit Free Press*, 303 F.3d at 683. On November 21, 2002, the newspaper-plaintiffs filed a petition for rehearing en banc with the Third Circuit Court of Appeals. Appellant's Petition for Rehearing En Banc, at 17, North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (No. 02-2524). The petitioners stated that the rehearing was warranted because the decision directly conflicted with the Sixth Circuit Court of Appeals in *Detroit Free Press*, was "irreconcilable" with Supreme Court and Third Circuit decisions, and involved an area of great importance. *Id.* at 1.

84. North Jersey Media Group v. Ashcroft, 123 S.Ct. 2215 (2003).

85. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (stating that in matters of immigration, "over no conceivable subject is the legislative power of Congress more complete"). In *Fiallo*, the petitioners challenged a provision in the Immigration and Nationality Act of 1952, which disallowed alien special immigration status for a father's illegitimate child. *See id.* at 791. However, a mother and child receive special treatment in the same circumstances. *See id.* The father-petitioners claimed that the statute discriminated against them based on their sex and marital status at the time the child was born. *Id.* The Court recognized that while congressional determinations with respect to aliens within our borders are subject to judicial review, that review is limited due to the extraordinary powers of the political branch in the area of immigration. *Id.* at 794-95. The dissent focused not on those individuals who would not be admitted based on their parent-child status, but on citizens of the United States who would be segregated into a class of persons that were not afforded full constitutional rights. *Id.* at 807 (Marshall, J., dissenting).

86. The Chinese Exclusion Case, 130 U.S. 581, 603-04 (1889) (stating that if the government could not control the influx of immigrants, then the nation's sovereignty would diminish).

87. *Id.*

Congress has implemented its authority in this area through a series of both broad and specific delegations of authority to the Attorney General concerning "the administration and enforcement . . . [of] laws relating to the immigration and naturalization of aliens."[88] In executing this authority, the Attorney General must establish regulations necessary to the conduct of his duties, such as developing standards and rules on issues that are rationally related to the statute upon which he is relying.[89] Though the immigration laws have been amended many times, the Attorney General's authority has not been significantly altered; he or she remains the principal actor enforcing the immigration laws of the United States.[90]

88. Immigration and Nationality Act, 8 U.S.C. § 1103(a)(1) (2002). The Attorney General is granted all duties that do not conflict with those granted to the President, the Secretary of State and its officers, or diplomats, or consular officers. *Id.* However, the Attorney General's determination of all questions of law control as to the remaining offices. *Id.*

89. *Id.* § 1103(a)(3); *see* Fook Hong Mak v. INS, 435 F.2d 728, 730-32 (1970) (holding that the congressional grant of discretion to the Attorney General in matters of immigration allows the Attorney General to consider the circumstances of the time and to issue regulations regarding identifiable groups based on his findings); *see also* Matter of Koden, 15 I. & N. Dec. 739, 746-47 (1976) (stating that the Attorney General may fashion procedures within his discretion, including disciplinary proceedings); Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979).

In *Narenji*, the plaintiffs challenged a regulation issued by the Attorney General that required all nonimmigrant aliens of Iranian descent who were in the United States on student visas to report to INS offices to provide information as to their living arrangements and status in school. *Narenji*, 617 F.2d at 746. Failure to comply with the regulation would subject the students to deportation proceedings. *Id.* at 747. The District of Columbia Circuit Court of Appeals held that the regulation was within the Attorney General's discretion. *Id.* First, the court looked to the authority conferred upon the Attorney General by Congress to establish such regulations. *Id.* Next, it looked to the foreign policy of the executive branch's objectives. *Id.* Because the regulation was promulgated in response to the Iranian government's seizure of the United States Embassy in Tehran, and in an effort to encourage release of the hostages taken therein, the court deferred to the President's foreign policy authority. *Id.* at 747-48.

90. *See* 8 U.S.C. § 1103(a) (2002); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 503, 110 Stat. 1214 (1996); Immigration Act of 1990, Pub. L. No. 101-649, § 503, 104 Stat. 4978 (1990); Immigration and Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3359 (1986).

B. Judicial Deference Should Be Heightened in the Name of Public Interest

1. An Early Recognition of Congressional and Executive Authority to Regulate in the Public Interest

Article I, Section 8 of the Constitution grants Congress the power to legislate immigration laws in the interest of American citizens.[91] *The Japanese Immigrant Case* is an historical example of the executive branch regulating immigration in the name of public interest.[92] In that case, the Court determined whether an existing act of Congress, which prohibited "paupers or persons likely to become a public charge" from entering the country, conflicted with a treaty between the United States and Japan.[93] The treaty provided the citizens of each country the "full liberty to enter, travel or reside" in the other contracting country.[94] The treaty included a provision that it would not affect any laws regarding "police and public security."[95] The Court found that the government interest in preventing paupers and the like from immigrating to the United States was a matter of police and public security, and thus, the government had the authority to deny entry to the Japanese

91. U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization "). Congress can delegate this power to executive officials, but it is still not in the hands of the judiciary. *See* The Japanese Immigrant Case, 189 U.S. 86, 98 (1903) (citing In re Oteiza, 136 U.S. 330 (1890); Benson v. McMahon, 127 U.S. 457 (1888); Philadelphia & Trenton R.R. v. Stimpson, 14 Pet. 448, 458 (1840); Martin v. Mott, 12 Wheat. 19, 31 (1827).

A cornerstone case of judicial deference is *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), in which the Supreme Court recognized Congress' plenary power to regulate in the interest of interstate commerce. *See* John J. Coughlin, *The History of the Judicial Review of Administrative Power and the Future of Regulatory Governance*, 38 IDAHO L. REV., 109-10 (2001); *see also* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 132, 135 (1944) (deferring to the NLRB's determination that the newsboys were employees within the meaning of the National Labor Relations Act).

92. *See* The Japanese Immigrant Case, 189 U.S. 86, 98 (1903) (stating that it is not within the judiciary's province to review immigration matters in opposition to the determinations of the legislative and executive branches).

93. *Id.* at 94, 96-97. The Deficiency Appropriation Act of October 19, 1888, as amended March 3, 1891, stated that the excludable classes were "[a]ll idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists" and anyone who received money or a ticket to come to the United States from a person that fell within one of those classes. *Id.* at 94-95.

94. *See id.* at 96.

95. *See id.* at 97.

immigrants.[96] The Court firmly upheld its earlier opinions and found that Congress's power to determine who may enter the United States, and on what terms they could stay, was absolute.[97] It stated that the fact that these powers are to be entrusted to the executive branch to enforce "without judicial intervention, [is a] principle[] firmly established" by precedent.[98] On the one hand, the Court recognized congressional and executive authority to limit the judiciary's role in the area of immigration; while on the other, the Court held tightly to its authority to review due process violations of aliens who had assimilated into American society.[99]

2. The Judiciary's Deference to the Political Branches in Cases of Communist Sympathizers

While the Supreme Court in *The Japanese Immigration Case* specifically drew a line between Congress's and the executive's plenary power in exclusion cases, and those that are subject to judicial review in "deportation" cases,[100] the Court has been more deferential in times when deportable aliens are considered a potential threat to national security.[101] During the rise of Communism in the early to mid-twentieth

---

96. *Id.* ("[F]or [the treaty] expressly excepts from its operation any ordinance or regulation relating to 'police and public security.' A statute excluding paupers or persons likely to become a public charge is manifestly one of police and public security.").

97. *The Japanese Immigrant Case*, 189 U.S. at 97-98 (noting that Congress may "exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention").

98. *Id.* at 97.

99. *See id.* at 100-01 ("[I]t is not competent for . . . any executive officer, at any time . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.").

100. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (IIRIRA) aliens were either "excluded" or "deported." *See* Immigration and Naturalization Service, *Glossary & Acronyms*, *available at* http://www.ins.gov/graphics/glosary.htm (last modified Jul. 18, 2002). The two categories have now been collapsed into one term: removed. *Id.* However, because case law makes a distinction between exclusion and removal, it is important to know the difference. An alien is excluded when he presents himself at the border and the government makes a decision prior to entry not to allow the alien into the country. *See id.* An alien is "deported" after gaining entry to the United States if it is found he has violated any immigration laws. *Id.*

101. *See* Galvan v. Press, 327 U.S. 522, 523, 532 (1954) (holding constitutional a congressional statute providing for the deportation of aliens involved in the Communist Party); Harisiades v. Shaughnessy, 342 U.S. 580, 581, 596 (1952) (*Id.*); *see also* Narenji v. Civiletti, 617 F.2d 745, 747-48 (D.C. Cir. 1979) (finding that a regulation that required

century, the Court deferred to Congress's enactment of several laws to exclude or remove those associated with the Communist Party,[102] and to the executive branch's deportation of the "associating" aliens.[103] Several of these cases involved legal permanent resident aliens who had lived in the United States for many years.[104]

One challenge involved the Alien Registration Act.[105] In *Harisiades v. Shaughnessy*, the three resident alien petitioners had resided in the United States since they were teenagers.[106] Each was summoned to deportation hearings when the INS discovered his involvement with the Communist Party.[107] The Court rejected the petitioners' assertions that

---

Iranian nonimmigrant students to check in with INS officials was within the foreign policy powers of the President).

102. *See, e.g.*, *Harisiades*, 342 U.S. at 590 ("We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a legislative mistake.").

103. *Id.* at 588-89. The Court stated that:

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Id. *See* discussion *supra* note 89.

104. *See, e.g.*, *Harisiades*, 342 U.S. at 581-82. *But see* Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L. L. 840, 842 (1989) (citing the many civil liberty victories beginning in the 1950's communist-era, including the right to international travel, the invalidation of government restrictions on Communist propaganda, and the invalidation of restrictions on employment of Communists in defense facilities).

105. *See* Alien Registration Act § 30, 8 U.S.C. § 137 (1940) (repealed 1952). The Alien Registration Act made deportation mandatory for all resident aliens who were members of organizations that advocated the "overthrow of Government by force and violence." *Harisiades*, 342 U.S. at 589 n.15. This applied to all qualifying aliens, even if the alien had severed ties with the organization prior to the enactment of the Act. *Id.* The Act was signed after Congress received evidence that Soviet Union Communists were using aliens to infiltrate the United States in an attempt to subvert preparations for the United States' involvement in World War II. *Id.* at 590. The Supreme Court in *Harisiades*, in comparing the political environment in 1952 to that in 1940 when the Act was signed, stated that "[c]ertainly no responsible American would say that there were then or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security." *Id.*

106. 342 U.S. at 581-83. Petitioner Harisiades came to the United States from Greece when he was thirteen years of age and had been a permanent resident for thirty-six years at the time of the decision. *Id.* at 581-82. Petitioner Mascitti, a citizen of Italy, entered the United States at the age of sixteen and remained a permanent resident for the next thirty-two years. *See id.* at 582. Petitioner Coleman was a native of Russia and entered the United States at the age of thirteen, thirty-eight years prior to this decision. *See id.* at 583.

107. *Id.* at 581-83. Each petitioner had a different level of involvement. *See id.* Harisiades joined the Workers Party, knowing and agreeing with the principles and philosophy of the Communist Party. *See id.* at 581-82. Mascitti, also a member of the

they should be treated as citizens because they had been admitted as permanent residents.[108] Instead, the Court focused on national security issues.[109]

The Supreme Court stated that when national security is at stake, it is the province of the government to act in the interest of national sovereignty.[110] The majority explained that these petitioners were not entitled to the same constitutional protections as citizens because, even though they had the privilege of being permanent residents of the United States, they had done so without denouncing their foreign citizenship.[111] This dual status allowed them to claim protections under both domestic and international law, whichever best suited them, and to evade American responsibilities, such as pledging allegiance to the United States.[112] The Court found that such issues are especially significant in times of war, when a resident alien's country becomes an enemy of the United States.[113] During such times, the alien's "allegiance prevails over his personal preference and also makes him our enemy, liable to expulsion or internment."[114] The Court stated that only Congress could determine when to "terminate [the Nation's] hospitality" because it is in the best position to determine what is appropriate in regard to foreign relations.[115]

Two years after the *Harisiades* decision, the Supreme Court addressed a challenge to the Internal Security Act of 1950, an Act that required the Attorney General to deport aliens who were members of the Communist Party.[116] In *Galvan v. Press*, a resident alien petitioner[117] challenged the

---

Workers Party, knew it advocated violence, but claimed never to be clear on its policies. *Id.* at 582. He resigned his membership in 1929. *See id.* Ms. Coleman was a member of the Communist Party for a year and claimed she joined solely because of a particular injustice it was fighting at the time. *Id.* at 583.

108. *Id.* at 584-91.

109. *Id.* at 588-91.

110. *Id.* at 587-88. ("But [the ability to expel aliens] is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.").

111. *See Harisiades*, 342 U.S. at 585-87.

112. *See id.* ("[T]o protract this ambiguous status within the country is not his right but is a matter of permission and tolerance.").

113. *Id.* at 587.

114. *Id.*

115. *See id.* Justices Douglas and Black in dissent turned their heads on the majority's reliance on Congress to regulate immigration laws. *See id.* at 598 (Douglas, J., dissenting). The scathing and curt dissenting opinion claimed that the right to life and liberty was an express right conferred by the Fifth Amendment, whereas the power of Congress to regulate deportation was implied. *See id.* at 599. Therefore, due process should prevail, no matter what the congressional reasoning. *See id.* at 600-01.

116. *See* Galvan v. Press, 347 U.S. 522, 526 (1954).

constitutionality of the statute on the grounds that it violated his Due Process rights.[118] The Court declared the statute constitutional and found that the petitioner must be deported, but did so with an air of hesitation.[119] The Court stated that if it was "writing on a clean slate," it might extend Due Process considerations to the regulation of aliens in times of war.[120] However, citing Supreme Court precedent[121] and Congress's long-held responsibility of setting immigration policy,[122] the Court declined such an approach.[123]

3. In the Past, the Supreme Court Has Placed Limits on an Alien's Defenses to Deportation in the Name of National Security

In *Reno v. American-Arab Anti-Discrimination Committee*[124] (AAADC), the Supreme Court relied upon the need to protect foreign intelligence in holding that aliens could not claim selective enforcement as a defense to deportation.[125] This case involved a group of immigrants

---

117. *See id.* at 523. Petitioner was a Mexican alien who had lived in the United States for thirty-six years. *Id.* at 532 (Black, J., dissenting). He had an American wife and four American-born children. *Id.* In 1948, the petitioner was questioned by the INS, at which time he admitted to a two-year membership in the Communist Party, from 1944 to 1946, ending two years prior to the questioning. *Id.* at 523.

118. *See id.* at 525. Specifically, the petitioner asserted that there was insufficient evidence that he was a knowing member of the Communist Party, and therefore, he was not deportable. *Id.* at 525. The Court reviewed the legislative history and determined that there did not have to be any knowledge that the group had an interest in overthrowing the United States government. *Id.* at 526. The mere fact of membership was sufficient to place petitioner in a deportable class. *See id. But cf.* Bridges v. Wixon, 326 U.S. 135, 156-57 (1945) (holding that affiliation with a workers' union that subsequently became tied with Communism was not sufficient to justify deportation).

119. *See Galvan*, 347 U.S. at 530-31.

120. *See id.*

121. *Id.* at 531-32 ("We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, . . . and must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional.").

122. *Id.* at 531 ("But that the formulation of these policies [pertaining to the entry of aliens] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."). Again, the same dissenters in *Harisiades* voiced their disagreement, primarily based on the fact that the petitioner's involvement was minimal at a time when the Communist Party was a recognized political party. *Id.* at 532 (Black, J. & Douglas, J., dissenting); *see also id.* at 526. In his dissenting opinion, Justice Douglas implied that a balancing test could be used, providing that those who are law-abiding, peaceful citizens should be granted due process of law, thereby suggesting that not all aliens deserved such a privilege. *See id.* at 534 (Douglas, J., dissenting).

123. *See id.* at 531-32.

124. 525 U.S. 471 (1999).

125. *Id.* at 488 (1999).

who belonged to a militant group, the Popular Front for the Liberation of Palestine, which the Government characterized as an international terrorist and communist organization.[126] The aliens claimed that they were selected for deportation because of their association with the organization, and that targeting them based on membership in a political association violated their First and Fifth Amendment rights.[127]

The Court stated that while selective enforcement is an acceptable claim in criminal law, an alien cannot assert it as a defense against deportation.[128] Such a defense would require the Attorney General to advance general domestic policy reasons for the alien's deportation, but also to disclose "foreign-policy objectives and (as in this case) foreign-intelligence products and techniques" in order to defend against a selective enforcement claim.[129] The Court stated that although deportation "may assuredly be grave," it is necessary "to . . . end *an ongoing violation* of United States law," and therefore, it is irrelevant if the alien was improperly selected.[130]

C. The Balance Between the First Amendment and Governmental Interests

1. The First Amendment in Criminal Cases

The First Amendment's bar to Congress's abridgement of the freedoms of speech and press is not absolute; instead, it must be balanced with "valid but conflicting governmental interests."[131] In *Richmond Newspapers, Inc. v. Virginia*,[132] a case in which the Court held that the

126. *Id.* at 473.

127. *Id.* at 474.

128. *See id.* at 490-91.

129. *Id.* at 490-91. Justice Scalia authored the majority opinion, which recognized that the executive should not be required to:

> [D]isclose its "real" reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

Id. at 491.

130. *AADC*, 525 U.S. at 491.

131. Konigsberg v. State Bar of California, 366 U.S. 36, 50 n.11 (1960) (holding that a statute prohibiting a Communist sympathizer from becoming a member of the California Bar did not violate the petitioner's freedom of speech because of the underlying government interest).

132. 448 U.S. 555 (1980) (stating that absent an overriding interest, there is a presumption that all criminal trials be open). In addition to Chief Justice Burger's opinion, there were two concurring opinions, three concurrences in judgment, one dissenting opinion, and one Justice who did not take part. *See id.* Justice Rehnquist dissented, on the ground that while the Supreme Court has the authority to review

public and press have a constitutional right to be present at criminal trials, the Supreme Court developed a test to balance these competing interests.[133]

In *Richmond Newspapers*, the defendant, who was on trial for the fourth time on the same murder indictment, requested that the proceedings be closed because he was concerned that he would not be able to receive a fair trial.[134] A Virginia trial judge agreed, relying on a state code that allowed judges to close hearings at their discretion.[135] Representatives of Richmond newspapers challenged the order, asserting that proceedings could not be closed unless there were factual findings proving there was no other way to protect the defendant.[136] The trial court disagreed and ordered that the proceeding remain closed.[137] The newspaper petitioned the Virginia Supreme Court, which denied its appeal based on a finding of no reversible error by the lower court.[138] The newspaper appealed to the United States Supreme Court, which reversed the prior orders and formulated a test to determine whether the closing of a criminal trial violated the free speech guarantees of the First

---

decisions made by the state supreme courts on issues involving the Constitution, in this instance the Court should have deferred to the decision of the Virginia Supreme Court. *See id.* at 605-06 (Rehnquist, J., dissenting).

133. *See id.* at 580-81. Justice Stevens, in his concurrence, stated that "[t]oday . . . for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 583 (Stevens, J., concurring).

134. *See id.* at 559. Defendant was indicted for murdering a hotel manager. *Id.* After the defendant was convicted in the first trial, the Virginia Supreme Court held that the trial court improperly admitted a bloodstained shirt into evidence. *Id.* At the retrial, a juror asked to be excused after jury selection, and no alternate had been appointed. *Id.* The third trial ended in a mistrial when a juror told the other jurors about newspaper articles he had read on the defendant and the pending case. *Id.* The fourth trial was the one at issue in *Richmond Newspapers, Inc. v. Virginia*. *Id.* at 559-60. The defendant asserted concerns that, based on the numerous and drawn-out history of the proceedings to that point, there could be information leaks and inaccurate reporting by the media. *Id.* at 560-61. He also claimed that the "smallness" of the community in which the case was heard could create a risk of juror improprieties. *Id.*

135. *Id.* at 560 (citing VA. CODE § 19.2-266 (Supp. 1980)). The code relied upon, provides in part:

> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

Id. at 560 n.2.

136. *See id.* at 560.

137. *Richmond Newspapers*, 448 U.S. at 562. The judge subsequently released the jury and found the defendant not guilty due to lack of sufficient evidence by the prosecution. *Id.* Tapes of the proceedings were distributed to the public as soon as the trial ended. *Id.* at 562 n.3.

138. *See id.* at 562.

Amendment.[139] The Supreme Court cited four reasons why criminal proceedings should remain open despite a valid government interest.[140] First, the public's right to attend criminal trials can be traced through history to the beginning of American jurisprudence.[141] Second, the First Amendment guarantees the right to freedom of speech, press and assembly.[142] Third, there is a fundamental right to enjoy these First Amendment assurances.[143] And Fourth, access to criminal trials offers a therapeutic remedy to those who have been shocked by horrific crimes.[144]

Six years after the decision in *Richmond Newspapers*, the Supreme Court again addressed the issue of open criminal proceedings in *Press-Enterprise Co. v. Superior Court of California*, this time extending the right of access to the preliminary hearings of criminal proceedings.[145] The Court, drawing upon its analysis in *Richmond Newspapers*, narrowed the inquiries to be made in determining whether a criminal proceeding should be closed: first, courts must determine whether there is a

---

139. *See generally Richmond Newspapers*, 448 U.S. at 555.

140. *Id.* at 564–73.

141. *Id.* at 573-75.

142. *Id.* at 575-77.

143. *Id.*

144. *Id.* at 570-71.

145. 478 U.S. 1 (1986) (*Press-Enterprise II*). In *Press-Enterprise II*, the issue was whether there was a First Amendment right to access preliminary hearing transcripts in a criminal prosecution. *Id.* at 3. A constitutional presumption exists that most stages of the criminal process, including preliminary hearings, voir dire selection, and criminal contempt proceedings, are open to the public and press. *See, e.g.*, Press-Enterprise Co. v. Super. Ct. of Cal., 464 U.S. 501, 505-10 (1984) (*Press-Enterprise I*) (extending the presumption of openness to voir dire examination and juror selection); Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 603-11 (1982) (holding that the protection of victims may justify closing certain stages of criminal proceedings); *Richmond Newspapers*, 448 U.S. at 580-81 (stating that unless persuaded otherwise by movant, there is a presumption that all criminal trials be open); Levine v. United States, 362 U.S. 610, 616 (1960) (holding that criminal contempt proceedings must be open); United States v. Simone, 14 F.3d 833, 842 (3d Cir. 1994) (upholding a ruling that a post-trial examination of juror for potential misconduct be open); United States v. Smith, 787 F.2d 111, 116 (3d Cir. 1986) (finding a presumption of openness to transcripts of sidebars or chambers conferences concerning evidentiary rulings); United States v. Criden, 675 F.2d 550, 554 (3d Cir. 1982) (acknowledging that pretrial suppression, due process, and entrapment hearings require due process protections).

Various federal courts have extended the First Amendment right outside of the criminal arena. *See* Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177, 181 (3d Cir. 1999) (applying the *Richmond Newspapers* test to grant a right of access to municipal planning meeting); Cal-Almond, Inc. v. USDA, 960 F.2d 105, 110 (9th Cir. 1992) (finding a First Amendment right to an administrative voter list); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir. 1984) (extending the *Richmond Newspapers* analysis to civil trials); Soc'y of Prof'l Journalists v. Sec'y of Labor, 616 F. Supp. 569, 574-75 (D. Utah 1985) (holding that the *Richmond Newspapers* test requires administrative hearings to be open).

tradition of presumptive openness (the "experience" prong); and second, courts must determine whether the judicial process will benefit from an open proceeding (the "logic" prong).[146] The Court asserted that whenever openness will have a positive effect on the judicial process, it shall act accordingly to ensure access to procedures.[147] In recognizing the preliminary hearing as an integral part of the trial process, the Court held that the presence of the press would assure that the hearing would be conducted in a just manner.[148]

2. The First Amendment and Right of the Press to Access Information

The Supreme Court has held that there is no unfettered right to access government-controlled national security information.[149] The right to access information is limited by the nature of the information and any

146. *Press-Enterprise II*, 478 U.S. at 8-9. The court in *North Jersey Media Group* referred to the *Richmond Newspaper* analysis as the "Richmond Newspaper Standard," consisting of the "history of openness" prong and the "logic" prong. North Jersey Media Group v. Ashcroft, 205 F. Supp. 2d 288, 300-01 (D.N.J. 2002), *rev'd*, 308 F.3d 198 (3d Cir. 2002).

147. *See Press-Enterprise II*, 478 U.S. at 12-13. The Court held that in order for the criminal prosecution process to function properly, a neutral observer must be present in the courtroom. *Id.* at 12-13. The Court stated that "[t]he absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,' makes the importance of public access to a preliminary hearing even more significant." *Id.* (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)). Also, the court found that the label of the proceeding should not be determinative of the access granted. *Id.* at 12 ("California preliminary hearings are sufficiently like a trial to justify [that public access is essential to the proper functioning of the criminal justice system.]").

148. *See id.* at 12-13. Conversely, the dissenters recognized the defendant's concern that pre-trial publicity may jeopardize his right to a fair trial. *Id.* at 20 (Stevens, J., dissenting). Instead of ensuring a fair trial by allowing the press to be present, the dissenters asserted that the majority view may reach an opposite result. *See id.* at 29 (Stevens, J., dissenting).

149. *See* Zemel v. Rusk, 381 U.S. 1, 17 (1965) (stating that the right to speak and publish does not create an unrestrained right to gather information); *see also* Houchins v. KQED, Inc., 438 U.S. 1, 15-16 (1978) (holding that there is not a First Amendment right to access prisons). In *Houchins*, the Supreme Court determined that the press has no right to access government information unless the political branches decide to grant such a right. *Id.* There, the Supreme Court rejected the petitioners' arguments that they should be granted full access to view a county jail. *Id.* at 3. The Court refused to grant petitioners' relief based on the First Amendment because their claims "invite[] the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes." *Id.* at 12. The Court noted that while public discussion as to efficient prison management could generate significant debate, the press was not necessarily the best conduit for debate due to the risk of selective publication of information. *Id.* at 13-14. Instead, the Court reasoned, the task of generating debates should be left to Congress, the neutral participant. *Id.* at 14-16.

countervailing security interests.[150] Although there is "freedom of the media to *communicate* information once it is obtained," there is no evidence that "the Constitution *compels* the government to provide the media with information or access to it on demand."[151]

The Supreme Court has shown concern for the ability of government to conduct business under the restrictions of the First Amendment. In *Zemel v. Rusk*, the petitioner claimed that the United States government's ban on travel to Cuba interfered with his First Amendment right to assess first-hand the effects of the United States's foreign and domestic policies on Cuba.[152] The Supreme Court held that there was no First Amendment right to travel abroad in order to evaluate the government's activities.[153] Instead, it placed executive decisions above First Amendment access to information claims when the safety of the country was at stake.[154]

III. THE JUDICIARY SHOULD GIVE INCREASED DEFERENCE TO THE EXECUTIVE BRANCH IN MATTERS OF IMMIGRATION

The Supreme Court, in its interpretation of federal immigration law, has always defined a limited and relatively deferential role for the federal judiciary.[155] However, of all the court opinions from *Detroit Free Press* and *North Jersey Media Group*, the only court to exhibit such deference was the Third Circuit Court of Appeals.[156] District courts in New Jersey

---

150. *See Richmond Newspapers*, 448 U.S. at 586 (Brennan, J., concurring).

151. *Houchins*, 438 U.S. at 9.

152. *Zemel*, 381 U.S. at 16.

153. *Id.* at 16-17. In his majority opinion, Chief Justice Warren expressed this concern:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information.*

Id. (emphasis added); *see also* Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690 (1984) (discussing the Freedom of Information Act's recognition of the importance of discretion when dealing with information in a national security context, in that it exempts information that is "secret in the interest of national defense or foreign policy") (citing 5 U.S.C. § 552(b)(1)(A) (1982)).

154. *Zemel*, 381 U.S. at 16-17.

155. *See* discussion *supra* Part II.

156. *See* North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002); *see also supra* Part I.C.2. for a discussion of the opinions comprising the procedural history of *Detroit Free Press* and *North Jersey Media Group*.

and Michigan, and the Sixth Circuit Court of Appeals, showed very little deference, if any, to the government's national security concerns.[157]

A. A Suggested Deferential Standard of Review for Issues of National Security

In both *Detroit Free Press* and *North Jersey Media*, the government urged the courts to use the "facially legitimate and bona fide standard" first espoused by the Supreme Court in *Kleindienst v. Mandel*.[158] In *Kleindienst*, the government denied the issuance of a visa to a known revolutionary Marxist who was invited to the United States by members of academia to participate in conferences at various universities.[159] The plaintiffs consisted of Mr. Mandel, the speaker, and a number of American citizens who claimed violations of their First Amendment rights to hear Mr. Mandel's views and engage him in discussion.[160] The Supreme Court upheld the Attorney General's prerogative to exclude an alien, as long as the reason was "facially legitimate and bona fide."[161] In other words, an alien's exclusion falls within the broad discretion of the executive branch; denial of a waiver from such exclusion should not be examined as long as the Attorney General's reasoning is made in good faith, and is based on the surrounding circumstances.[162]

The judiciary should continue to employ this standard for issues involving immigration and the First Amendment. There could hardly be an issue more facially legitimate and bona fide than protecting the United States against terrorists. *Kleindienst* and the media cases at bar all involve United States's citizens arguing that the executive has disregarded their First Amendment rights based on the executive's treatment of a third-party alien.[163]

---

157. *See* discussion *supra* Part I.C.

158. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). The court in *North Jersey Media Group* specifically declined to follow the *Kleindeinst* deference test. North Jersey Media Group v. Ashcroft, 205 F. Supp. 2d 288, 297 (D.N.J. 2002), *rev'd,* 308 F.3d 198 (3d Cir. 2002). The court stated that the Creppy closure was issued to "serve other law enforcement objectives," implying that was not the case in *Kleindeinst. See id.* That was exactly the case in *Kleindeinst*, in which Mandel was excluded from entry, based among other things, on his strong advocacy of "economic, governmental, and international doctrines of world communism." *See Kleindienst*, 408 U.S. at 754-60.

159. *See Kleindienst*, 408 U.S. at 756-57.

160. *Id.* at 759-60.

161. *Id.* at 769.

162. *Id.*

163. *See id.* at 754; Detroit Free Press v. Ashcroft, 303 F.3d 681, 682 (6th Cir. 2002); North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 199 (3d Cir. 2002).

The fact that *Kleindienst* is an exclusion case rather than a deportation case should not be dispositive.[164] As evidenced by *Harisiades* and *Galvan*, the Court will defer to the Attorney General, even in deportation cases, if the government's interest is national security.[165] In addition, *Kleindienst* was decided almost twenty years after *Hariasides* and *Galvan*, and specifically cited to the precedent of *Galvan* when declining to overturn that line of cases.[166] The Court's reference to *Hariasides* and *Galvan* implies that in deciding *Kleindienst*, the Court considered those decisions to be good law and that the current Supreme Court would have to overturn precedent to apply a standard other than the "facially legitimate and bona fide standard" set forth in *Kleindienst*.[167]

B. Agencies Are Required To Create Regulations in Furtherance of Their Responsibilities

Deference also should be given to the executive branch because each department head is charged with creating regulations for his department.[168] Courts have historically recognized this responsibility by leaving the formulation of procedures to the discretion of the individual agencies.[169] Courts give deference because administrators are more familiar with their agency's responsibilities and therefore have more expertise in their respective fields than the federal courts. Agencies can develop procedural rules which are a better fit for the peculiarities of the individual industries and the responsibilities of the agencies involved.[170]

---

164. *See* discussion *supra* Part II.B.2. (articulating the difference between an exclusion case and a deportation case).

165. *See* discussion *supra* Part II.B.2.

166. *Kleindienst*, 408 U.S. at 766-67 (citing Justice Frankfurter's acknowledgement that judicial precedent does not allow the Court to decide adversely to congressional enactments).

167. *See id.* at 762, 766-67.

168. *See* Administrative Procedure Act, 5 U.S.C. § 301 (2000).

169. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 548 (1978) (holding that nothing in the applicable statutes or in the circumstances surrounding the case warranted the Court of Appeals to overturn procedures established by the Atomic Energy Commission). Administrative rulemaking was first permitted in 1813 when the Supreme Court authorized Congress to delegate certain legislative powers to the executive branch. *See, e.g.*, Coughlin, *supra* note 91, at 99.

170. FCC v. Schreiber, 381 U.S. 279, 290 (1965).

> [A]n outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.

Id.

INS regulations currently allow judges to hold closed meetings.[171] In recognizing the key role that the INS plays in the war against terrorism, the Creppy Memo simply extended the existing regulation to account for tasks of the agency where the improper disclosure of information could threaten national security.[172]

In *Zadvydas v. Davis*,[173] Justice Breyer, in dicta, suggested that deference might be required when the INS promulgates regulations against the backdrop of national security concerns.[174] *Zadvydas*, decided by the Supreme Court in 2001, involved the question of whether "dangerousness" alone justified detaining aliens for indefinite amounts of time in instances where deportation was ordered, but not possible.[175] Justice Breyer's opinion focused on the due process rights of the resident immigrants.[176] According to the Court, because the aliens had entered and lived as permanent residents, they should be afforded procedural due process rights.[177] The Court held that even though the aliens were dangerous criminals and deportation orders had been issued, they could not be arbitrarily detained while awaiting deportation.[178]

---

171. *See* INS Immigration Court Rules of Procedure, 8 C.F.R. § 3.27(b) (2002) (excepting from the presumption of openness, "[f]or the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing."); INS Removal Proceedings, 8 C.F.R. § 240.10(b) (2002) (stating that "[r]emoval hearings shall be open to the public, except that the immigration judge may, in his or her discretion, close proceedings as provided in § 3.27 of this chapter.").

172. *See* Memorandum from Michael Creppy, *supra* note 25.

173. 533 U.S. 678 (2001).

174. *Id.* at 690-91, 696. The Sixth Circuit in *Detroit Free Press* cited the *Zadvydas* Court's statement that its decision might be different if the case had involved terrorism. Detroit Free Press v. Ashcroft, 303 F.3d 681, 692 (6th Cir. 2002). The court rejected the notion, however, that the statements in *Zadvydas* could be applied in current cases, stating that the procedural protections required that closure determinations in deportation hearings should be made on a case-by-case basis. *Id.* at 692-93.

175. *Zadvydas*, 533 U.S. at 682. Alien Zadvydas had a long criminal record that included various drug crimes, attempted robbery, attempted burglary, and theft. *Id.* at 684. He was determined to be a flight risk. *Id.* The alien in a companion case, Kim Ho Ma, was involved in a gang shooting and was convicted of manslaughter. *Id.* at 685. *See generally* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365 (2002) (discussing the *Zadvydas* opinion and the possible legal and political ramifications of the Court's holding).

176. *See Zadvydas*, 533 U.S. at 690.

177. *Id.* at 693-94 (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)). The Court distinguished the situation of an alien-citizen from one who is stopped at the border, holding that those who do not enter the country are not afforded any constitutional rights. *See id.* at 693. Hence, congressional plenary power remains intact for those situations. *See* Aleinikoff, *supra* note 175, at 368-69.

178. *Zadvydas*, 533 U.S. at 682 (construing the statute to have an implicit reasonable time limitation). Zadvydas was born to Lithuanian parents in a German displaced persons camp and moved to the United States when he was eight years old. *See id.* at 684.

The statute under review involved post-removal detention that allowed the Government to detain an alien beyond the allowed ninety-day period.[179] The aliens based their claim, not on the Attorney General's discretion, but on the procedural issue, i.e., the authority of the Attorney General to exercise discretion under the statute.[180] The Court in *Zadvydas* held that the Attorney General does not have the authority to indefinitely detain an alien if removal will not be effected in the reasonably foreseeable future.[181] Despite that holding, the Court specifically noted that no consideration was given to "terrorism or other special circumstances" that accord "heightened deference to the judgments of the political branches with respect to matters of national security."[182] This language suggests that the current Court may also be willing to afford more deference to the Government's procedural decisions when national security is at issue.[183]

IV. CLOSING DEPORTATION PROCEEDINGS PURSUANT TO THE CREPPY MEMO DOES NOT VIOLATE THE FIRST AMENDMENT

A. No Clear Presumption Exists That Immigration Hearings Are Open Proceedings

The first requirement of the *Richmond Newspaper* analysis - the "experience" prong - cannot be met in the case of closed deportation hearings because there is no clear presumption that immigration hearings are open.[184] As the Third Circuit stated in *North Jersey Media Group*, "the tradition of open deportation hearings is too recent and inconsistent

---

Zadvydas was being held indefinitely because no country would accept him, each claiming he was not a citizen of that nation. *Id.* His renewed application to become a Lithuanian citizen was pending at the time of the trial. *Id.* Ma was born in Cambodia where he stayed until he was two years old, at which time he and his parents fled to several countries, ending up in the United States at the age of seven. *See id.* at 685. Ma filed a writ of habeas corpus at the end of the statutory ninety-day detention period, and was released on the basis that Cambodia had no repatriation agreement with the United States. *Id.* at 686.

179. *Id.* at 682-83; *see also* Immigration and Nationality Act, 8 U.S.C. §§ 1226(a)(2),(c) (2000).

180. *See Zadvydas* 533 U.S. at 688.

181. *Id.* at 701-02. A reasonably foreseeable future requires that there be a "significant likelihood" of removal within a presumptive time period of six months. *Id.* at 701.

182. *Id.* at 696. *See also supra* note 174 and accompanying text.

183. *See Zadvydas*, 533 U.S. at 696; *see also* Reno v. Flores, 507 U.S. 292, 305-06 (1993) (showing deference to the executive branch's procedural decision not to release juvenile aliens except to their parents, close relatives, or legal guardians).

184. North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 211 (3d Cir. 2002).

to support a First Amendment right of access."[185] *Richmond Newspapers* requires an unbroken and uncontradicted history of openness.[186] This history does not exist in the context of immigration hearings.[187]

While there is a practice of open deportation hearings, it is a practice subject to a wide variety of exceptions.[188] Regulations require that hearings be closed in cases that involve an abused alien spouse or an abused alien child.[189] An alien spouse can request the proceeding to be open, but a child cannot.[190] The proceeding can also be closed in the interest of "protecting witnesses, parties, or the public interest."[191] This INS regulation is that which Chief Immigration Judge Creppy relied upon when issuing his memo.[192] Additionally, current practice includes deportation hearings that are conducted in places from which the public is banned, including prisons and hospitals.[193] And deportation hearings that involve asylum claims are required to be closed unless the alien requests otherwise.[194] As demonstrated, sufficient examples of regularly closed deportation hearings exist to support a finding that there is no unspoken history of open proceedings.

---

185. *See id.*

186. *Id.* at 212 (citing *Richmond Newspapers*, 448 U.S. at 572-73).

187. *Id.* at 213.

188. In applying 8 C.F.R. § 3.27(b) (2002), which allows for closure of immigration hearings to protect "witnesses, parties, or the public interest," immigration judges have not used a strict scrutiny analysis. *See* Government's Application for a Stay Pending Appeal, *supra* note 26, at 18. Instead, immigration judges frequently close immigration hearings when an alien so desires. *Id.*

189. INS Immigration Court Rules of Procedure, 8 C.F.R. § 3.27(c) (2002). This regulation states:

> In any proceeding before an Immigration Judge concerning an abused spouse, the hearing and the Record of Proceeding shall be closed to the public unless the abused alien spouse agrees that the hearing and the Record of Proceeding shall be open to the public. In any proceeding before an Immigration Judge concerning an abused alien child, the hearing and the Record of Proceeding shall be closed to the public.

Id.

190. *Id.*

191. 8 C.F.R. § 3.27(b) (2002).

192. *See* Government's Application for a Stay Pending Appeal, *supra* note 26, at 6.

193. North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 212 (3d Cir. 2002) (citing H.R. REP. NO. 104-269, pt. I, at 124 (1996)).

194. *See* 8 C.F.R. § 208.30(g)(2)(iii) (providing for closure of hearings in asylum cases involving aliens who face a reasonable fear of persecution or torture if they return to their home country).

B. The Experience Prong of Richmond Newspapers Should Focus Not Only on the Positive Aspects of Open Proceedings, But On the Harm That the Public Will Endure

The Third Circuit in *North Jersey Media Group* emphasized the need to look at the positive attributes of an open proceeding, and the ways in which openness will "impair[] the public good."[195] In this context, the *Richmond Newspapers* analysis demonstrates that there will always be a finding of public good because openness will always promote citizen debate.[196] However, merely facilitating discussion is hardly a virtue that cannot be overcome by serious national public interest issues.[197]

As history reveals, the judiciary has been deferential to the executive branch in matters concerning national security.[198] This deference should extend to the balancing of the logic prong of the *Richmond Newspapers* test. The Third Circuit in *North Jersey Media Group* followed such a deferential approach by stating:

> The assessments before us have been made by senior government officials responsible for investigating the events of September 11th and for preventing future attacks. These officials believe that closure of special interest hearings is necessary to advance these goals, and their concerns, as expressed in the Watson Declaration, have gone unrebutted. To the extent that the Attorney General's national security concerns seem credible, we will not lightly second-guess them.[199]

The reason for withholding information, as expressed by the Executive Assistant Director for Counterterrorism and Counterintelligence of the Federal Bureau of Investigation, Dale Watson, is that the investigation consists of many different pieces that, when placed together, create a mosaic.[200] Mr. Watson expressed his concern with the judiciary's

---

195. *North Jersey Media Group*, 308 F.3d at 217.

196. *Id.* ("[W]ere the logic prong only to determine whether openness serves some good, it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access.").

197. *See id.*

198. *See* discussion *supra* Part II.

199. *North Jersey Media Group*, 308 F.3d at 219 (footnote omitted).

200. *Id.*; *see also* Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36,799 (May 28, 2002) (to be codified at 8 C.F.R. pt.3) (declaring that the measures are necessary "[d]ue to the mosaic-like nature of intelligence gathering, for example, [w]hat may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in context" (quoting *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983)); North Jersey Media Group v. Ashcroft, 205 F. Supp. 2d 288, 301 (D.N.J. 2002), *rev'd*, 308 F.3d 198 (3d Cir. 2002) (recognizing that the government's interests include: avoidance of setbacks to its terrorism investigation and prevention of harm to detainees if their identities become public); *see also* CIA v. Sims, 471 U.S. 159, 178 (1985) (citing other intelligence gathering

proposed case-by-case analysis, stating that its "lack of experience regarding national security" and its "inability to see the mosaic" may cause it to make incorrect and severely detrimental determinations when considering isolated facts.[201]

The Supreme Court has recognized the potential danger that may ensue if the judiciary forces officers of the executive branch to disclose classified information.[202] Justice Scalia noted in *AAADC* that if the INS has to provide the real reason for deporting each alien it deems to be a special threat, it could reveal detrimental foreign intelligence information or objectives.[203] It appears Justice Scalia did not believe the judiciary possesses the requisite information to make a full and informed decision when national security is at issue.[204]

V. CONCLUSION

While the executive branch should not have the right to function unchecked by other branches of government, sufficient history and precedent supports the proposition that some leeway is appropriate when regulating in the interest of national security. The federal judiciary should follow this precedent by allowing the INS to properly and completely conduct its duties when processing aliens, and assisting other governmental investigative agencies in tracking down aliens who may pose a threat to the United States. It is the executive branch, through the FBI, CIA, and INS, that holds the necessary information to subvert another attack - not Congress, or the Judiciary. This proposed deference may help avoid a replay of September 11, 2001.

---

cases); Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978) (observing that "intelligence gathering . . . is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair").

201. *North Jersey Media Group*, 308 F.3d at 219. Another ramification of a case-by-case determination is that the immigration system could become inundated with cases if the press and/or the public challenged each determination by an immigration judge to close a proceeding, which would cause great delays in the investigation on terrorism. *See* Government's Application for a Stay Pending Appeal, *supra* note 26, at 32-33.

202. *See* Reno v. American-Arab Anti-Discrimination Comm. (AAADC), 525 U.S. 471, 490-91 (1999); *see also* discussion *supra* Part II.B.3.

203. *AAADC*, 525 U.S. at 490-91.

204. *See id.* at 489-90.